Supreme Court, U. S.
FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, et al.,

Petitioners,

v.

ALFRED E. DAVIS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BARRY L. GOLDSTEIN
DEBORAH M. GREENBERG
ERIC SCHNAPPER
O. PETER SHERWOOD
10 Columbus Circle
Suite 2030
New York, New York 10019

Attorneys for Amicus Curiae

INDEX

PAGE

Interest of *Amicus* 1

ARGUMENT

I. Petitioners' Arguments Would Render Title VII Ineffective as a Bar to Discriminatory Employment Criteria 2

A. Adverse Impact 3

B. The Validity of the Test 6

II. Police Department Selection Policies Should Be Subject to the Same Standards as are Those of Other Employers 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, —— U.S. ——, 45 L.Ed.2d 280 (1975) 2, 4, 6, 7, 7n

Alexander v. *City of Augusta* (S.D. Ga., No. 1777) 9n

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 7n

Arnold v. *Ballard*, 390 F. Supp. 723 (N.D. Ohio 1975) 9

Bell v. *City of Jackson* (S.D. Miss., C.A. No 72-J-153) 9n

Boston Chapter, NAACP, Inc v. *Beecher*, 504 F.2d 1017 (1st Cir. 1971) 7n

Carter v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971) 9

Castro v. *Beecher*, 459 F.2d 725 (1st Cir. 1972) 5n

Castro v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973) 9

Chance v. *Board of Education*, 458 F.2d 1167 (2d Cir. 1972) 7n

PAGE

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 2, 4, 4n, 6, 7

Headon v. *City of Cleveland* (N.D. Ohio, No. C-73-330) 9n

Kirkland v. *New York State Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975) 9

McDonnell Douglas v. *Green*, 411 U.S. 792 (1973) 5n, 7n

North State Law Enforcement Officers Ass'n v. *City of Charlotte* (W.D.N.C. No. 2938) 9n

Officers for Justice v. *Civil Service Commission*, 371 F. Supp. 1328 (N.D. Cal. 1973) 9

Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) 4

Shield Club v. *City of Cleveland* (N.D. Ohio, No. C-72-1088) 9n

United States v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) 7n

United States v. *Local 638*, 360 F. Supp. 979 (S.D.N.Y. 1973), *aff'd sub nom. Rios* v. *Enterprise Ass'n. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) 5n

United States v. *United Ass'n. of Journeymen & Apprentices*, 314 F. Supp. 160 (S.D. Ind. 1969) 5n

Vulcan Society v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973) 9

Other Authority:

Statistical Abstract of the United States, p. 870 (1971 ed.) 5n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, et al.,

Petitioners,

v.

ALFRED E. DAVIS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

Interest of *Amicus**

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authoriz-

---

* Letters of consent to the filing of this Brief from counsel for the petitioners and the respondents have been filed with the Clerk of the Court.

ing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving Title VII of the Civil Rights Act of 1964 and discrimination in employment generally. Among these were the two cases in this Court that have established the basic principles regarding the validity of tests and other employee selection criteria under Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L.Ed.2d 280 (1975). *Amicus* has a continuing interest in the development and application of the decisions in those cases because of its extensive involvement in all facets of Title VII litigation.

ARGUMENT

I.

Petitioners' Arguments Would Render Title VII Ineffective as a Bar to Discriminatory Employment Criteria.

Amicus urges that the arguments of petitioners are contrary to established law, particularly as expressed in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L.Ed.2d 280 (1975), and that their acceptance would seriously undermine the effectiveness of Title VII as it applies to all employers.

A. *Adverse Impact.*

It is undisputed that the test in question here excluded blacks from consideration at a rate three times that of whites. Nevertheless, petitioners urge that there is no "adverse impact" because their overall hiring policies have resulted in an appropriate percentage of blacks on the Washington, D. C. police force. The argument is wrong for a number of reasons.

1. In essence, the petitioners' argument is that if an employer hires a percentage of blacks equal to the proportion of blacks in the relevant geographical area,[1] then a court may not examine or hold illegal the employment criteria used in the process. What is being argued for is quota hiring in its true and invidious form, *i.e.*, the hiring up to and no more than a set number of blacks.[2] Thus, for example, an employer living in an area where 20% of the population eligible for employment is black, could hire 20 blacks out of every 100 employees. The 21st black could be denied employment because of his race, and no inquiry would be possible since the proper percentage was achieved. Thus there would be no "disproportionate racial impact . . . traceable to selection practices considered as a whole" (Brief for Petitioners, p. 12), as opposed to the particular practice of rejecting the 21st black "considered in isolation" (*Ibid.*). In the present case, although the test excluded one out of every two blacks, as opposed to about one out of six whites, it

---

[1] The relevance of the 7,500 square miles petitioners seek to use is discussed, *infra*.

[2] An upper-limit quota is to be distinguished from a goal or standard (often erroneously called a quota), *i.e.*, a *minimum* number of a minority group to be aimed for as a demonstration that employment practices are not discriminatory.

is, according to petitioners, not "discriminatory" because the police department has met its quota by other means.

Of course, *Griggs* v. *Duke Power Co.* and *Albemarle Paper Co.* v. *Moody*, do *not* hold that the focus is on the overall process to the exclusion of the particular procedures used. To the contrary, the issue in both cases was precisely whether *"the tests in question"*,[3] "operate to exclude Negroes"[4] disproportionately. Petitioners fail to understand that the ultimate inquiry in a Title VII case is whether particular individuals have been denied their right to be free of discrimination. A black applicant who is denied employment because the employer's quota is filled, or because he is required to pass a test that excludes blacks, does not have *his* rights vindicated because someone else has been hired. Indeed, in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) the employer similarly argued that because 70-75% of the applicants for the job in question and 75-80% of those hired were women, there was no discrimination against women shown. The Court rejected this argument because the challenged rule—barring women with pre-school-age children from hire—excluded the plaintiff because of her sex. The fact that most women were not denied employment was irrelevant to whether the particular practice in question was illegal.

2. Petitioners assert that their overall hiring practices are valid because the proportion of blacks hired is close to that in the geographical area from which the pool of applicants comes. The acceptance of their argument would render meaningless the extensive body of law permitting

[3] *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d at 301.

[4] *Griggs* v. *Duke Power Co.*, 401 U.S. at 431.

a *prima facie* case of discrimination to be made through statistical data,[5] by permitting employers to manipulate the relevant population pool. Petitioners assert that because they recruited outside the immediate metropolitan area the relevant area has a radius of 50 miles. This more than 7500 square mile area is three times the size of the Standard Metropolitan Statistical Area,[6] and encompasses not only the District of Columbia and its immediate suburbs, but most of Maryland, including Baltimore and Annapolis, and half-way to Richmond.[7]

Once an employer can arbitrarily adopt any geographical area, it can so manipulate statistical data as to be able to defeat any claim of racial discrimination in hiring. Thus, for example, the use of a 50 mile radius for an Oakland, California, based company would sweep in an area past San Jose to the South and include suburban areas that are nearly all-white. Similar results would obtain for heavily black cities such as Chicago, Detroit, and Cleveland. All an employer would have to do would be to conduct some recruitment in a location to include not only it but everything between it and his place of business. Clearly, particularly for an employer such as a police department whose

[5] See, *e.g.*, *Castro* v. *Beecher*, 459 F.2d 725, 728 (1st Cir. 1972); *United States* v. *Local 638*, 360 F. Supp. 979, 989 (S.D. N.Y. 1973), *aff'd sub nom. Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States* v. *United Ass'n of Journeymen & Apprentices*, 314 F. Supp. 160 (S.D. Ind. 1969). See also, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973).

[6] See, Statistical Abstract of the United States, p. 870 (1971 ed.). Indeed, only 5 S.M.S.A.'s in the United States are over 7,500 square miles.

[7] At one time petitioners recruited nation-wide, and *amicus* can only speculate as to why the claim is not made that the entire country is the relevant recruitment area, so that a 12% black population figure can be used.

activities are limited to the immediate metropolitan area, the logically relevant geographical area would be the city, county or the immediate suburbs, *i.e.*, those places where in fact the great bulk of employees reside.[8]

B. *The Validity of the Test.*

Petitioners' argument as to the validity of the test used must also be rejected as inconsistent with Title VII. An employer could set up a three-tiered system of tests—training—job and only show a relationship between test performance and training performance to circumvent *Griggs* and *Moody*. He would never have to demonstrate that performance either on the test or the training was a valid measure of job performance. He would be able to insulate his selection process from the ultimate *relevant* question in a Title VII case, *viz.*, is the disproportionate exclusion of minorities *from a job* justified? Thus, there would be no determination:

> "whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d at 305.

[8] Typically, concentrations of blacks in the inner city are surrounded by white residential areas. Thus, a fifty-mile radius would maximize the whites in the pool without regard to whether they belong to the socio-economic groups most likely to be interested in the job at issue. For example, a 50-mile radius in the San Francisco Bay Area, New York, or Cleveland would include suburbs and counties with some of the highest median incomes in the United States (Marin County, Westchester County, and Shaker Heights, respectively). Residents in such areas would be the least likely to even apply for the kinds of industrial, police or fire department jobs at issue in the typical Title VII case. If the city itself and its immediate suburbs are used as the relevant area, on the other hand, the population, both white and black, is much more likely to accurately reflect the actual applicant pool.

Similarly, the petitioners' suggestion that the requirement that objective validation standards must demonstrate a "manifest job relationship" (*Griggs* v. *Duke Power*, 401 U.S. at 432; see also *Albemarle Paper* v. *Moody*, 45 L.Ed.2d at 301, 306-307), be replaced with a subjective standard must be rejected. The Courts have accorded deference to the EEOC guidelines precisely because they embody such a requirement. The vague Civil Service Commission standard that a "rational relationship" be shown is simply not in accordance with the attainment of the objectives of Title VII. There can be no assurance of, in the words of this Court, "equality of employment opportunities and [the elimination of] those discriminatory practices and devices which have fostered racially stratified job environments,"[9] if such a standard is all that must be met. Thus, the adoption of petitioners' arguments would result not only in the effective overruling of *Moody* and *Griggs*, but the overturning of a body of case law in the lower courts that has made equality in employment a reality for blacks and other minorities.[10]

II.

Police Department Selection Policies Should Be Subject to the Same Standards as are Those of Other Employers.

No one would quarrel with the general proposition that police departments must be able to select persons fully qualified for police work. But petitioners' apparent contention that police departments must therefore be free to im-

[9] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). See also, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d at 296-300.

[10] See, e.g., *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974); *Chance* v. *Board of Education*, 458 F.2d 1167 (2d Cir. 1972); *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

pose whatever qualifications they deem "rationally related" to such work must be rejected. The issue in a Title VII lawsuit against the police, as in one against any other employer, must be whether job qualifications that screen out disproportionate numbers of minorities are in fact shown to be manifestly related to job performance. This burden cannot be met by generalized assertions as to *e.g.*, the necessity for verbal skills, without a professionally acceptable demonstration that such skills are in fact necessary for the position.

Petitioners' discourse on opinions expressed in various President's commissions' reports (Brief for Petitioners, pp. 18-22) is notable in its omission of the same reports' emphasis on the necessity of increasing minority representation in urban police departments. Thus, for example, the National Advisory Commission on Civil Disorders found:

> [T]hat for police in a Negro community to be predominantly white can serve as a dangerous irritant; . . . Negro officers also can increase department insight into ghetto problems. . . .[11]

Similarly, the Second Circuit, in a decision applying a strict standard of validation rather than a "rational basis" test, noted:

> [T]his is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement. *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1341 (2d Cir. 1973).

[11] Report, p. 165 (U.S. Government Printing Office, 1968).

The lower courts have found that there is no irreconcilable conflict between the two concerns thus expressed, *i.e.*, having non-discriminatory, valid employment criteria and thereby increasing black representation, and selecting qualified police officers. See, *Arnold* v. *Ballard*, 390 F. Supp. 723 (N.D. Ohio 1975); *Officers for Justice* v. *Civil Service Commission*, 371 F. Supp. 1328 (N.D. Cal. 1973). *Cf.*, *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973). And in cases involving not only police but fire and corrections departments, the lower courts have required the development of new examinations that will serve both functions. See, *e.g.*, *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Kirkland* v. *New York State Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971). In these cases the courts have been able to assess the feasibility of requiring selection methods that meet Title VII standards without interfering with legitimate personnel standards. The experience of *amicus* in similar cases also has been that the district courts are fully capable of exercising their equitable discretion so as to fashion remedies that achieve a proper balance between these interests. Thus, in a number of our cases, following a showing of discriminatory impact of non-validated tests, appropriate orders have been entered, a number by consent, requiring police and fire departments to restructure their selection methods. In none of these has there been a decline in the quality of personnel or level of performance as a result.[13]

[13] *Alexander* v. *City of Augusta* (S.D. Ga., No. 1777); *Bell* v. *City of Jackson* (S.D. Miss., C.A. No. 72-J-158); *Shield Club* v. *City of Cleveland* (N.D. Ohio, No. C-72-1088); *Headon* v. *City of Cleveland* (N.D. Ohio, No. C-73-330); *North State Law Enforcement Officers Ass'n* v. *City of Charlotte* (W.D.N.C. No. 2988).

BEST COPY AVAILABLE

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
BARRY L. GOLDSTEIN
DEBORAH M. GREENBERG
ERIC SCHNAPPER
O. PETER SHERWOOD
10 Columbus Circle
Suite 2030
New York, New York 10019

Attorneys for Amicus Curiae